

SB 753 (Steinberg) Background and Fact Sheet

SUMMARY

This bill would give the State Central Valley Flood Protection Board (Board) greater powers to remove encroachments (pipes, stairs, docks, etc.) on Federal-State levee lands where the owner of the encroachment does not have a permit for the encroachment or is “out of compliance” with the permit. The bill only applies to property where the government has land rights. The bill does not apply to privately owned land where the government does not have land rights.

BACKGROUND

“Project levees” are Federal-State levees in the Central Valley for which the state or a political subdivision committed to the United States Army Corps of Engineers (“the Corps”) to operate and maintain the levee and hold the federal government harmless under any liability that might result, including if the levee fails.

In the Paterno lawsuit (*Paterno v. State of California* (2003) 113 Cal.App.4th 998), the court determined that the state was responsible for the failure of the Feather River levee that resulted in the flooding of the town of Linda in 1986. Under the facts of that case, the court found the state liable because its plan had failed to adequately provide for the operation and maintenance of the levee. The cost to the state was about \$500 million.

In SB 5 (Machado, 2007), the Legislature required that levees protecting large urban areas be upgraded to 200-year protection (twice the “standard” 100-year protection) and that small communities attempt to achieve 100-year protection. The Legislature also required the Department of Water Resources to develop a new flood plan for the Central Valley, essentially an upgrade of the 1910 plan prepared by the Corps of Engineers.

The Corps is the federal partner in these levees. After Hurricane Katrina, the Corps has begun making comprehensive evaluations of levees and encroachments. In 2012, the Corps determined that 51 of 119 regulated levee systems in the Central Valley are no longer eligible for federal funding to repair flood-damaged levees, in some cases because of encroachment problems. This determination probably shifts these costs to state and local agencies. These determinations also may increase the likelihood that the state would be found liable under Paterno if the levee failed.

In the past the Board has not been particularly diligent in removing illegal encroachments and “out of permit compliance” encroachments. As a result, there are many encroachment issues that need to be addressed if levees are to be upgraded in accordance with SB 5 – typically by increasing levee height, bulk, or by adding impervious slurry walls through the middle of the levee.

CURRENT LAW AND PROPOSED BILL:

- (1) Under current law, it is unlawful for any person or public agency to place an encroachment on project levee lands without getting a permit from the State Central Valley Flood Protection Board (Board). [WC Sections 8608, 8708, 8709.5, 8709.6, CCR Title 23, Section 6]

- (2) Under current law, the Board is required to provide oral, written, or certified mail notice to any affected person prior to issuing a cease and desist order. [WC Section 8709.5, 8709.6]

Under this bill, if the Board is considering a cease and desist order but is unable to notify the affected person by oral, written, or certified mail, the Board may place a copy of the notice on the structure or facility that is the subject of the order.

- (3) Under current law, if someone places an encroachment on a levee or on levee lands without a permit or is out of compliance with an issued permit, the Board may issue a cease and desist order to the offending party. After providing an opportunity for a public hearing, the cease and desist order may require removal of the encroachment [WC Section 8709.5, 8709.6]

Under this bill, the Board's authority to take summary abatement action or remedial action to repair the levee is clarified and the Board is authorized to recover its costs by pursuing any legal remedies that are available, including placing a lien on the property. A person subject to the Board's authority may seek judicial review.

- (4) Under current law, the Board may request the Attorney General to take the offending party to court. The court may impose fines and enjoin the unauthorized activity. [WC Sections 8596, 8608, 8704, 8709, 8709.7]

Under this bill, the Board after holding a public hearing may levy administrative fines, identical to what a court may impose. A person subject to administrative fines may seek judicial review. All fines collected will be deposited into the Flood Risk Management Fund, a fund and designated for the Board's use to carry out its duties and functions following appropriation by the Legislature.

- (5) Under current law, The Board may hold hearings before a committee of one or more members of the board or before the chief engineer of the board. [WC Section 8732]

Under this bill, the Board may also hold hearings before a qualified neutral hearing officer.

- (6) The bill provides for due process prior to the Board's exercise of its abatement, remedial, or penalty authority.
- (7) Under existing law, the Board does not have clear authority to charge for the cost of evaluating and issuing permits for encroachments.

Under this bill, the Board may clearly charge for the cost of the Board and the Department of Water Resources time in processing and reviewing permit applications.

COMMENTS:

- (1) As an example of the Board's limited authority to resolve encroachment issues, the Board spent one and a half years trying to authorize the construction of a fence on state-owned lands adjacent to a project levee that was repeatedly damaged by motorcycles and other vehicles. This levee protects the town of Linda, the town that was flooded in 1986, which resulted in the Paterno decision.
- (2) Under current law, the Board's administrative enforcement authority is limited and the Board must often engage in lengthy administrative proceedings or rely on the Attorney General to file litigation against a person who has illegally placed an encroachment on a levee or is out of compliance with a permit. Litigation is expensive and time consuming. Given higher priorities and the cost, the Attorney General may choose not to litigate. The delay in resolving the encroachment may put public safety at risk and may increase the risk of state liability.
- (3) This bill would give the board authorities similar to that given under current law to cities and counties to abate nuisances pursuant to Government Code sections 38773 and 25845, as well as new abatement authority recently granted to the State Lands Commission (AB 2082, 2012).
- (4) The Board recognizes that the exercise of the authorities of this bill would have to be used in a reasonable and appropriate manner.

Support and Opposition

None recorded at this point

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